FILED
DEC 27 1993
OFFICE OF THE CLERK

(5)

No. 93-464

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

G-K DEVELOPMENT COMPANY, INC.,
Petitioner,

vs.

BROADMOOR PLACE INVESTMENTS, L.P. et al.,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. AS STATED BY THIS COURT IN BUTNER V. UNITED STATES, 440 U.S. 48 (1979), CERTIORARI IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS ON THE PROPER INTERPRETATION OF FEDERAL STATUTES GOVERNING THE ADMINISTRATION OF BANKRUPTCY ESTATES.

Federal Respondent, representing Resolution Trust Corporation ("RTC"), and Respondent Robinson ("Robinson") acknowledge that the Tenth Circuit decision conflicts directly with other circuit courts on whether appellate exceptions to mootness exist under 11 U.S.C. § 363(m) and argue only that the exceptions cited by Petitioner are not applicable (Rob-Br, 5-6). The Tenth Circuit's decision specifically stated it was not addressing the issue of exception to mootness and affirmed a dismissal by the District Court on the basis of mootness (Writ, App. 4-5). This Court granted certiorari in Butner to resolve a conflict between the circuit courts on whether state law applies to a security interest in property or a federal rule of equity. The Tenth Circuit's decision involves the broader concept of whether a party has a right to appeal, under 11 U.S.C. § 363(m), the sale of bankruptcy assets.

The Fifth Circuit in Matter of Sullivan Cent. Plaza I, Ltd., 914 F.2d 731 (5th Cir., 1990) and the Ninth Circuit in In re Mann, 907 F.2d 923 (9th Cir., 1990), both recognize an exception to mootness where state law permits a remedy, which is not recognized by the Tenth Circuit. The RTC incomprehensibly argues, in its Brief (RTC-Br, 7-8), that Petitioner has not relied on a state-law basis for recovery, that the sale to Robinson did not violate Kansas law and that Kansas law does not grant Petitioner a right to recover the property from Robinson. Robinson, throughout these proceedings, admits that he had prior knowledge that the Debtor executed a contract with Petitioner. Such knowledge denies Robinson good

faith purchaser status in Kansas. Hughes v. Cook, 232 P. 219 (1925). Kansas law provides Petitioner relief by requiring Robinson to reconvey the property to it as the initial good faith purchaser. Federal Savings and Loan Ins. Corporation v. Urschel, 157 P.2d 805 (1945).

Respondents misinterpret the Seventh Circuit's decision in In the Matter of EDC Holding Co., 676 F.2d 945 (7th Cir., 1982). The Seventh Circuit permits an appeal to determine whether the decision of a bankruptcy court on the issue of good faith lender or purchaser is erroneous without obtaining a stay order; the Tenth Circuit's decision, which invokes mootness, does not.

Robinson and RTC misstate the factual record of the Tenth Circuit's decision to distinguish it from the exceptions to mootness as found by the Third Circuit in In re Abbott's Dairies of Pennsylvania, Inc., 788 F.2d 143 (3rd Cir., 1986). The facts in Abbott's and the Tenth Circuit's decision are almost identical. There is a conflict as the Tenth Circuit does not recognize exceptions to mootness: (a) The Third Circuit entered an Order of remand to the bankruptcy court to conduct an evidentiary hearing on the issue of collusion between the debtor and purchaser, the Tenth Circuit, invoking mootness, affirmed a remand where the Bankruptcy Court refused to conduct an evidentiary hearing on the issue of collusion[1] and refused to allow the introduction of documentary evidence[2]; (b) the Third Circuit remanded because of the District

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[1]Robinson argues (Rob-Br, 11) that at the hearing of September 10, 1990, Petitioner did not present evidence of collusion between Robinson and the debtor's general partner on the undisclosed management agreement. No evidence of collusion was presented in September, 1990 as Petitioner first learned of the collusion in December, 1990 and filed an Affidavit with the District Court.

[2]The refusal of the Tenth Circuit to allow an evidentiary hearing on collusion resulted in misidentification of the parties in collusion. The decision specifically references the collusion between Broadmoor (Debtor) and Robinson (Writ, App. 4-5). The collusion was between Robinson and Broadmoor, Inc. (Rob-Br, 24). There was never disclosure that Broadmoor, Inc., was owned by the Debtor's general partner and Robinson was paying him $170,000.00.

Court dismissing an appeal as moot prior to receiving the record, the Tenth Circuit, invoking mootness, affirmed the District Court's dismissing the appeal in the instant case as moot prior to receiving the record on appeal; (c) the Third Circuit remanded as the Bankruptcy Court based value of the debtor's assets on a contract price rather than an appraised value of 75%, the Tenth Circuit, invoking mootness, affirmed the Bankruptcy Court's finding of value from the purchase price in Robinson's contract.

There is a direct conflict between the circuits on the appellate mootness rule under 11 U.S.C. § 363(m). This conflict in statutory interpretation should be resolved by this Court.

II. THIS COURT'S DECISION IN BUTNER V. UNITED STATES, 440 U.S. 48 (1979), PROHIBITS THE USE OF A FEDERAL COMMON LAW OF EQUITY TO DETERMINE PROPERTY RIGHTS IN BANKRUPTCY.

The RTC agrees with Petitioner that the circuit courts have adopted a federal common law of equity based upon traditional concepts of good faith purchaser (Writ, 10, RTC-Br. 7) as 11 U.S.C. § 363(m) does not define "good faith purchaser." See also § 5:59 Bankruptcy Service, L.Ed. 78 (1990). This court, in Butner, held that "undefined considerations of equity provide no basis for adoption of a uniform federal rule. . .", Id. at 56. Robinson argues that the principle of state law in Butner is superseded by 11 U.S.C. § 363(m). Robinson's position is erroneous because of the absence of a definition of good faith purchaser in 11 U.S.C. § 363(m), which raises a required presumption that Congress left the determination of property rights in estate assets to state law. Nobleman v. American Savings Bank, ____ U.S. ____, 113 S.Ct. 2106, 2108 (1993) *citing Butner, Id., at 54-55.* Circuit courts have uniformly followed Butner by interpreting the undefined term "bona fide purchaser of real property" in 11 U.S.C. § 544 (a)(3) according to state real property law standards. Watkins v. Watkins,

922 F.2d 513 (10th Cir., 1991), In re Konowitz, 905 F.2d 55 (4th Cir., 1990) and In re Ward, 837 F.2d 124 (3rd Cir., 1988).

The Respondents rely heavily on the Tenth Circuit's decision that the Debtor could execute a second contract with Robinson on the basis that Petitioner's contract was merely an offer/bid and not binding on the Debtor. There is no citation to bankruptcy authority to support this federal common law theory. The Tenth Circuit's decision conflicts directly with precedence established by this Court and bankruptcy authority that a purchaser is bound to his bid prior to confirmation, Camden v. Mayhew, 129 U.S. 73 (1889), and that both Debtor and Petitioner are bound to their contract until judicially relieved by the Bankruptcy Court. 4B Collier on Bankruptcy § 70.98 ([16] at 1173-1174) (14th Ed., 1978). An accepted bid, even though subject to confirmation, is considered a contract concluded between the parties. Freehill v. Greenfeld, 204 F.2d 907, 908 (2nd Cir., 1953); Frazier v. Ash, 234 F.2d 320 (5th Cir., 1956).

There is no bankruptcy statute or rule that authorizes a debtor to execute two contracts for the sale of a real property asset. Absent such a statute, Butner and Nobleman mandate that state property law standards apply. As the debtor in possession, the Debtor has the power to bind the bankruptcy estate subject to court approval, Lincoln National Life v. Scales, 62 F.2d 582 (5th Cir., 1933), the Debtor could not execute a second contract until after a confirmation hearing on Petitioner's contract. Robinson's prior knowledge of Petitioner's contract denies him good faith purchaser status under Kansas law, which is applicable to the sale of real property in bankruptcy. In re Flannery, 11 B.R. 974 (Bankr. E.D. Penn., 1981).

III. PETITIONER HAS STANDING TO APPEAL THE BANKRUPTCY COURT'S ORDERS AS ITS RIGHTS WERE IMPAIRED BY THE INTRINSIC STRUCTURE OF THE BANKRUPTCY SALE.

The RTC and Robinson[3] (RTC-Br, 7; Rob-Br, 7) argue that Petitioner has no standing to appeal the Bankruptcy Court's Order as it is an "unsuccessful bidder." Robinson, interestingly, cites (Rob-Br, 23) In re Karpe, 84 B.R. 926 (Bankr. M.D. Penn. 1988), which denied standing to a second party like Robinson. In Karpe, a second bidder/purchaser tried to obtain standing to make an offer where the debtor in possession had signed a private sales agreement with a first purchaser. The bankruptcy court held the second purchaser had no standing as it was not a party in interest. Robinson and the RTC cite no circuit court authority that an "unsuccessful bidder" under 11 U.S.C. § 363(m) lacks standing to appeal; to the contrary, the Third Circuit, in Abbott's, supra, gave standing to an "unsuccessful bidder" which resulted in the bankruptcy court's order being reversed for violation of bankruptcy procedure and law. The circuit courts, in pre-Code cases, grant standing to an unsuccessful bidder who "attacks a bankruptcy sale on equitable grounds related to the intrinsic structure of the sale"[4] as the bidder brings himself within the zone of interest which the Bankruptcy Act seeks to protect and to regulate. In re Harwald Co., 497 F.2d 443, 444-445 (7th Cir., 1974) *citing Mason v. Ashbeck, 383 F.2d 779 (10th Cir., 1967)*; In re Time Sales Finance Corp., 445 F.2d 385 (3rd Cir., 1971) (by implication).

The presently applicable Bankruptcy Reform Act of 1978, 11 U.S.C. § 101, et seq., does not contain any express limitation on appellate standing. Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir., 1989) (citing § 39(c) of the Bankruptcy Act of 1898). The use of the word "person" in § 39(c) is less strict than the word "party" in § 25 of the Act. 1 Collier on Bankruptcy,

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[3]Robinson (Rob-Br, 7) misstates Petitioner's claim for relief which was correctly stated by the Tenth Circuit (Writ, App. 4-4).

[4]The Third Circuit aptly terms such structure as an opportunity for skulduggery, Abbott's, Id. at 149 (citation omitted).

¶3.03 at 180, 181 (15th Ed., 1990). In order to appeal a bankruptcy court's order, a litigant must qualify as a "person aggrieved" by the order. A "person aggrieved" by a bankruptcy order must demonstrate that the order diminishes the person's property, increases the person's burdens or impairs the person's rights. Matter of Andreuccetti, 975 F.2d 413, 416 (7th Cir., 1992), *citing In re Fondiller, 707 F.2d 441, 442 (9th Cir., 1983)*. Petitioner has standing to appeal the Bankruptcy Court's Orders (Writ, App. 8, 12) as its rights were impaired by a lack of prior notice and a hearing. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978). Petitioner, throughout its Petition for Writ of Certiorari and this reply, has outlined its rights that were impaired by the Bankruptcy Court's Orders. Petitioner's rights were impaired to the same extent as the "unsuccessful bidder" appellant's rights in Abbott's, supra, as described in Section I of this Reply Brief.

The term "unsuccessful bidder" derives from the pre-Code preferred statutory method of sale, the public auction. Petitioner's relationship with the Debtor was not from a public auction, but from a private sales agreement as authorized by Bankruptcy Rule 6004(e)(1)[5] adopted for the first time in the Bankruptcy Reform Act of 1978. If the term "unsuccessful bidder" is applicable to post-1978 transactions, then Petitioner would be the "successful bidder" as its bid/offer was first accepted by the Debtor. A successful bidder deprived of his bid by a referee's order can maintain an appeal in his own name and does not have to seek review in the name of the trustee. Castaner v. Mora, 234 F.2d 710, 715 n.3 (1st Cir., 1956).

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[5]Conduct of sale not in the ordinary course of business.

1. *Public or Private Sale.* All sales not in the ordinary course of business may be private or by public auction. . . .

IV. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN MARRESE V. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, 470 U.S. 373 (1985), AS THE BANKRUPTCY COURT'S SUPPLEMENTAL OPINION WAS NOT ENTERED FOR THE PURPOSE OF FACILITATING REVIEW.

Robinson argues (Rob-Br, 26) that the Supplemental Opinion of the Bankruptcy Court (Writ, App. 9) falls within an "exception to facilitate review" that he interprets from this Court's decision in Marrese, Id. There is no such exception in Marrese. Marrese involved two separate appeals on two separate issues. This Court found that the District Court, by exercising jurisdiction on two separate matters, facilitated review on appeal. In the Tenth Circuit's decision, the Bankruptcy Court's supplemental opinion was not on a separate issue but related to the primary issue on appeal - the good faith purchaser status of Robinson. Robinson's position that there is a difference between an appeal from a bankruptcy court to a district court and that from a district court to a court of appeals was rejected by the Ninth Circuit in its decision of In re Bailac, 694 F.2d 625 (9th cir. 1982).

V. THIS COURT'S DECISION IN ROGERS V. MISSOURI PACIFIC RAILROAD CO., 352 U.S. 518 (1957), PERMITS A GRANT OF CERTIORARI TO DETERMINE WHETHER A FEDERAL STATUTE HAS BEEN INTERPRETED CONTRARY TO CONGRESSIONAL INTENT BY A CIRCUIT COURT.

Supreme Court Rule 10.1 allows certiorari to determine important questions of federal law. There is no more important issue in bankruptcy law than the jurisdiction of a bankruptcy court in the sale of bankruptcy assets. Robinson (Brief, 21-23) does not address the issue of a bankruptcy court's jurisdiction but phrases his argument in terms that the Bankruptcy Court properly used its

discretion in selecting Robinson's contract[6]. Neither the RTC nor Robinson address the issue of whether the Tenth Circuit's decision is contrary to Congressional intent (Writ, 12), which, under Rogers, permits this Court to grant certiorari.

Robinson, in his argument, confirms the position of Petitioner that the Bankruptcy Court performed an impermissible administrative act (Rob-Br, 21):

> Had the Debtor requested that the bankruptcy court make a choice between G-K and Robinson, this may have been an impermissible administrative act;. . .

This is exactly what the Bankruptcy Court did at the request of the Debtor in its application for approval of sale:

> WHEREFORE, Debtor prays for an order of this court allowing Debtor to sell the aforesaid real property for no less than $5.5 million to either G-K or Forrest L. Robinson, as this court may direct, . . .

This Court should determine whether the Tenth Circuit's decision conflicts with Congressional intent on jurisdiction as expressed in the legislative history of the Bankruptcy Reform Act of 1978.

VI. PETITIONER'S RIGHT TO PRIOR NOTICE AND A HEARING UNDER THE DUE-PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AS STATED IN MULLANE V. CENTRAL HANOVER BANK & TRUST COMPANY, 339 U.S. 306 (1950), CANNOT BE ELIMINATED BY ROBINSON'S AGREEMENT WITH THE DEBTOR.

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[6]Robinson argues that his contract was more advantageous because of a $50,000.00 deposit (Rob-Br, 6). Robinson's 'deposit' consisted of a $5,000.00 cash deposit which was refundable and contingent upon approval and $45,000.00 that was paid after approval. Petitioner provided a $250,000.00 letter of credit, at the time of execution, to Debtor.

Robinson cites no authority (Rob-Br, 23-25) that Petitioner's right to prior notice, as stated in Mullane, Id., is satisfied by a clause giving Robinson the 'right' to assign his contract with the Debtor. Robinson's 'right' directly conflicts with Bankruptcy Rule 2002 that the debtor provide notice of the transaction being presented to the bankruptcy court.

The RTC (RTC-Br, 8) erroneously states that if Petitioner was deprived of due process by inadequate notice it is not a basis for reversing the judgment of the Court of Appeals. The Debtor, by failing to provide adequate notice of the proceedings in the Bankruptcy Court on September 10, 1990 (Writ, App. 12), violated Petitioner's right of due process under the Fifth Amendment which renders the Bankruptcy Court's order void. In re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir., 1985).

Robinson's argument that Petitioner is seeking two trials on the issue of his good faith purchaser status borders on being frivolous. No testimony or documentary evidence was introduced at the hearing on September 10, 1990, on the issue of good faith purchaser status. On remand, the Bankruptcy Court refused to receive testimony or documentary evidence on the issue of Robinson's collusion. Petitioner did not receive one hearing on the issue of good faith purchaser status with complete disclosure and never received a hearing upon which there was evidence or testimony on the issues concerned with good faith purchaser status (see footnotes 1 and 2) as the Bankruptcy Court entered its finding based upon the record of September 10, 1990 (Writ, App. 9, 12).

Robinson, without citing authority, argues (Rob-Br, 25) that G-K could not conduct discovery under Bankruptcy Rule 2004 regarding Robinson's collusion with the Debtor's general partner as Petitioner is not a "party in interest" (Brief, 25).[7] G-K, as a

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[7]Robinson's argument is inconsistent as on page 23 he states that "G-K and all other interested parties. . ." (Brief, 23).

prospective bidder, is a party in interest and is entitled to conduct discovery under Bankruptcy Rule 2004. In re Summit Corp., 891 F.2d 1 (1st Cir., 1989).

VII. THIS COURT'S DECISION IN LOUIS V. NATIONAL BANK, 364 U.S. 603, 706 (1961), THAT A PARTY SHOULD NOT RECEIVE A WINDFALL BY THE HAPPENSTANCE OF BANKRUPTCY IS NOT LIMITED TO UNSECURED CREDITORS.

Robinson seeks to distinguish the Tenth Circuit's decision from Louis on the basis that the issue of enriching unsecured creditors does not exist in the Tenth Circuit's decision. The principle established by this Court in Louis is not limited to unsecured creditors but to protect all parties from having their state property rights infringed because of the happenstance of bankruptcy. The breadth of the Louis decision is seen by its citing in Butner v. United States, supra, which involved a secured creditor. The court noted in Butner that this includes a reference to state law as it relates to ownership interests. Butner, Id. at 55. Robinson received a windfall by the Bankruptcy Court applying a federal common law of equity rather than Kansas real property standard of good faith purchaser.

CONCLUSION

On account of the importance of the federal questions raised and asserted conflicts in the circuits, United Brotherhood v. United States, 330 U.S. 395, 400 (1947), and reasons stated herein, Petitioner prays that a Writ of Certiorari should be granted to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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